No. 169

JUN 15 1956

HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT

OF THE

United States

October Term, 1955

TERRY I. BLUE,
Petitioner,

vs.

DOUGLAS McKAY, Secretary of Interior,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To The Honorable, The Chief Justice and The Justices of the Supreme Court of the United States:

Petitioner, Terry I. Blue, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia rendered in this cause.

OPINIONS BELOW

The United States Court of Appeals for the District of Columbia filed a *per curiam* opinion. It is appended hereto in the Appendix pursuant to Rule 23(a)(i) Revised Rules of the Supreme Court of the United States. Since the "per curiam" opinion specifically approves the opinion of the United States District Court for the District of Columbia, that opinion is also appended hereto in the Appendix.

The opinion of the United States Court of Appeals for the District of Columbia is not yet published in the official reports.

The opinion of the United States District Court for the District of Columbia is to be found in 136 Fed. Supp. 315.

The opinions are printed in the Appendix to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked to review a judgment of the United States Court of Appeals for the District of Columbia under 28 USCA Sec. 1254(1); 62 Stat. 928. The opinion and judgment for which review is sought were dated and entered on April 12, 1956. No rehearing was asked.

QUESTIONS PRESENTED FOR REVIEW

(1) Did patents of the United States issued pursuant to the Treaty of Guadalupe Hidalgo, the Protocol of Queretaro and the Act of March 3, 1851 to confirm titles to agricultural land held under Spanish or Mexican law merely confirm to claimants the title to the agricultural land which they held under Spanish or Mexican law, or did they also constitute a conveyance by the United States of the minerals below the surface of those lands, title to which was vested in the United States by cessation and which minerals were not owned by the grantees under their prior Spanish or Mexican Grants given pursuant to Spanish or Mexican Law?

(2) Is a power to convey real property owned by the United States conferred on officials of the United States by a statute which neither specifically confers nor forbids such a conveyance, but which is completely silent on the subject?

(3) Can officers of the United States who have no authority at all to dispose of Government property, by their conduct, cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act?

(4) Does the U. S. Patent involved herein convey to the grantees a fee simple title as the words are used in English Common Law, or does it merely confirm to them land which they theretofor held under title deduced from their Spanish ancestor Cristoval Dominguez, whose title was based upon a Spanish grant?

(5) Did the Act of March 3, 1851 grant jurisdiction to the commission to do anything more than confirm patents to land? Did it give the commission any jurisdiction to convey minerals under the land that had vested in the United States Government?

TREATIES AND STATUTES INVOLVED

Treaty of Guadalupe Hidalgo of February 2, 1848, 9 Stat. 922.

Protocol of Queretaro dated May 26, 1948 Act to Ascertain and Settle the Private Land Grants of the State of California, March 3, 1851, 9 Stat. 631. Secs. 8, 9, 11, 13 and 15 are particularly involved. They are appended hereto.

The clarifying provision of the Protocol of Queretaro dated March 26, which is particularly involved is appended hereto.

Mineral Leasing Act of February 25, 1920; 41 Stat. 437, 441; 30 USCA 182, 226, secs. 182 to 226.

STATEMENT OF THE CASE

The Mexican War was ended by the Treaty of Guadalupe Hidalgo of February 2, 1848, 9 Stat. 922. This treaty together with its clarifying Protocol of Queretaro (May 26, 1848) provided *inter alia* that "legitimate titles to every description of property personal and real existing in the ceded territories, are those which were legitimate titles under Mexican law in California and New Mexico up to the 13th day of May, 1846, and in Texas up to the 2nd day of March, 1836."

On March 3, 1951, Congress passed the "Act to Ascertain and Settle the Private Land Grants of the State of California", 9 Stat. 631. The Act established a Board of Commissioners to hear all land claims and to decide upon their legality. Appeals to the U. S. District Court and thence to the Supreme Court of the United States were conferred by the Act.

On October 19, 1852 heirs of Cristoval Dominguez filed a claim for the Rancho San Pedro which they claimed to own in fee. On Aug. 16, 1855 the Commissioners filed their opinion wherein they held that Cristoval Dominguez was the owner of the Rancho San Pedro by grant from the Spanish Governor Sola. The opinion closed with the statement: "A decree will be entered in general terms confirming the title of the petitioners to the premises the same as tenants in common in the proportions in which they are respectively entitled under their rights derived from the source above mentioned". (i.e. Cristoval Dominguez's grant from Gov. Sola).

On the same day (Aug. 16, 1855), the Decree of the Commissioners was filed. The significant words were ". . . it is therefore decreed that the same be confirmed to them to hold and possess the same as tenants in common in the respective shares and proportion which they hold in and to the premises hereby confirmed by title deduced from Cristoval Dominguez . . . ".

Appeal was taken to the U. S. District Court and the decision of the Commissioners was affirmed.

Appeal was taken to the Supreme Court of the United States but was later abandoned and the order granting the appeal was vacated.

On December 18, 1857 a patent was issued which recited the proceedings for confirmation, the decree of confirmation of the Commissioners and the affirmance thereof by the final judgment of the District Court of the United States for the Southern District of California and granted the tract of land described to the claimants "in the respective shares, and proportions which they hold in the premises by title deduced from Cristoval Dominguez . . .".

The "title deduced from Cristoval Dominguez" was title to the surface of the land only and did not and could not include minerals under Spanish or Mexican law. By cession, title to the minerals vested in the United States and the minerals became part of the public domain of the United States.[1]

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[1]The Commission under the Act of March 3, 1851 obviously had no jurisdiction to do more than Congress intended. They could only confirm the patents to the surface of the land. They had no authority or jurisdiction to convey the mineral rights below the land which rights belonged to the United States Government.

Construing the patent above referred to as one of confirmation and not of conveyance, Petitioner on Feb. 27, 1937 applied to the United States Land Office for an oil and gas lease on a portion of the premises described in the U. S. Patent aforesaid. On April 2, 1937 the application was rejected on the grounds that the United States did not own the minerals in the premises, they having "passed from the Government by patent".

On rehearing the application was again denied on April 8, 1949.

An application for reconsideration was rejected July 12, 1949.

This action followed on April 16, 1952.

The action was for a declaratory judgment, the purpose of which was to review final action of an administrative agency.

Jurisdiction was urged:

(1) Under the inherent right of the Court to grant mandatory relief,

(2) Under the terms of Sec. 10 of the Administrative Procedure Act (5 USCA, Sec. 1009),

(3) Under the terms of the Federal Declaratory Judgment Act, as amended (28 USCA Secs. 2201, 2202).

In the progress of the action, the type of relief was restricted and only a declaration that the minerals under the land in question belonged to the United States was sought together with the direction to the

Respondent that he reprocess the application for the oil lease on the basis that ownership of the minerals was in the United States.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(1) The United States Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court. The issues are as important as the Tidelands cases heard and decided by this Court. The ultimate consequences might well and properly enrich the treasury of the United States.

It is admitted that mineral rights worth many billions of dollars which formerly belonged to Mexico vested in the United States by cession. Some lay beneath ranchos whose surficial rights had vested in private persons by Spanish and Mexican grants prior to cession. Did a United States patent issued as a part of a statutory procedure to confirm to owners in the ceded territory the titles they enjoyed at cession under Mexican law have the effect of conveying in addition thereto the minerals beneath the surface which did not belong to them under Mexican law, but which were a part of the public domain of the United States when the Patent was issued? This question has never been decided by a federal court until this case. A dictum in a case before the Supreme Court of the State of California holds that the patent was a conveyance. (*Moore vs. Snow*, 17 Cal. 199). The question was not before the court in that case. The appeal was from a

judgment arising after demurrer. Fee simple title was not in issue. A construction of a United States Patent and whether it conveyed or confirmed was not in issue. Title to land was not involved. Fee simple title in the plaintiff was stipulated to in writing in an agreed statement of facts. The action was to recover the value of personal property wrongfully converted by a tort-feasor.

This dictum of a State Court is the stated basis for the policy of the Department of Interior in referring the application for an oil lease in this and all similar cases.

It was the stated basis of the argument of the Department of Justice in the briefs submitted in this cause.

It was admitted to be the only case in point in the U. S. District Court's opinion.

The Court of Appeals did not even write an opinion, but chose rather to foreclose the Government's rights, valued at many billions, by a mere *per curiam* observation affirming the judgment below.

A public question of great importance is involved: Shall the people of the United States be deprived of valuable property rights and their oil producing income by a failure of the Courts of the United States to pass upon them? The determination of the rights of the petitioner, will determine those rights of the government to recapture this asset.

The decision holds that a deed of confirmation is a conveyance in defiance of adjudications of the Supreme Court of the United States to the contrary.

The decision holds that power to convey public property is granted to officials by a statute which only provides for a patent of confirmation constituting mere evidence of a decree of confirmation. The decision announces the absurdity that statutory power to convey the public domain is conferred in a statute by the failure to forbid it therein.

(2) The United States Court of Appeals has decided a federal question in a way in conflict with applicable decisions of the Supreme Court of the United States.

The decision adds something to the decree confirming title to the owners of patents under a Spanish grant. It adds "mineral rights" worth many millions of dollars, the ownership of which was neither mentioned nor proved in the proceedings and which admittedly did not belong to the claimants at cession.

This violates the doctrine of *Langdeau vs. Hanes*, (21 Wall. 521; 88 U.S. 521; 22 Law Ed. 606) and *Joplin vs. Chacher* (192 U.S. 94; 48 Law Ed. 359) wherein it is held that a patent in a confirmatory proceeding adds nothing to nor takes anything away from the decree of confirmation.

The decision violates the plain wording of the Act of March 3, 1851 by construing a patent of confirmation into a conveyance of title by reading into it the technical wording of English Common Law when the

title to be confirmed stemmed from a Spanish Sovereign and the Statute states that the claim should be construed in so far as they are applicable by "the laws, usages and customs of the government from which the claim was derived . . ." (Act of March 3, 1851, 9 Stat. 631). One of the Justices of the U. S. Court of Appeals persisted during argument in viewing the words of the patent in harmony with the Rule in *Shelley's* case. He should have been concerned with the Royal Ordinances of Spain enacted May 22, 1783, which were promulgated in Mexico in 1784 and which after Mexican independence remained the law of Mexico until 1885. None of this Spanish and Mexican law appeared to be helpful in arriving at the *per curiam* decision herein sought to be reviewed.

The decision is in conflict with the *Boquillas Land & C. Co. vs. Curtis*, 125 U.S. 339; 53 Law Ed. 822, wherein Mr. Justice Holmes gently, but firmly, exposed the fallacy of the late Justice Field in regarding confirmations and conveyances as identical and restored in the literature of the Supreme Court of the United States the classic distinction between the terms. The decisions for which review is sought did not conflict in "words". The limits of a *per curiam* decision prevented discussion, but the effect is to implement the fallacy and discard the correction.

The decision holds that the words "in fee" in the claim determined the relief granted and hence granted "a fee". This is as absurd as the conduct of a sheriff would be who went forth to collect a tort judgment

and used the sum asked for in the complaint rather than the sum awarded in the judgment to measure the amount he should collect.

The decree of the Commissioners was a legal confirmation. The patent was only documentary evidence thereof. In construing the patent, its purpose and not its technical wording is the legal guide. Deeds absolute on their face have for centuries been construed as mortgages on proof that such was the purpose of the parties.

The purpose here was to confirm previously acquired title under Spanish or Mexican law. As stated by the Supreme Court of the United States in *Henshaw vs. Bissell* (18 Wall 255; 21 Law Ed. 835-8): ". . . the Court is thus compelled to look beyond the patents to the original source of title as it existed under the former government".

(3) The above instances all show that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision.

The Respondent, over objection, introduced maps showing present development of the property and the Court received it as having a legal effect upon the issue presented. The District Court in its opinion refers to the fact that the property "is in the heart of one of California's richest oil fields and that this suit would gravely interfere with title claims which have been in existence for a long period of time . . ." This

point incited substantial colloquy between the Court and counsel at argument before the United States Court of Appeals.

It is evident therefrom that both courts below were affected by considerations of political policy rather than exclusively applying existing law to the case at hand.

It is for the Congress and not the Courts to establish political policy. The late Justice Holmes, in explaining his concept of his Judicial Duty, began with the proposition that he was not God. A like humility is urged on all Judges when sentimental and emotional urges to enter the alien field of political policy weigh heavily on their judicial consciences and impel them to use judicial power to effect political purposes.

Implicit in the contention of the Respondent and in the utterances of both Courts below is the decision to go outside of the case, the law and the judicial process to settle a political question as they believe it ought to be settled.

This is an abrupt departure from a recent decision of this Court: *U. S. vs. California*, 332 U.S. 19, 91 Law Ed. 1889. In that case two sovereigns confronted each other. Title to minerals beneath land claimed by the State of California was at stake. The land had been in open, notorious possession of the State of California for nearly a century under claim of title. Numerous cases had been decided, based upon the maxim that ownership of land beneath the navigable waters of a State was in the State. Harbors, lighthouses, channels,

docks and wharves had all been constructed on such land under a claim of title by the State, to which United States officials had acquiesced for nearly a century. The United States Government had even purchased portions thereof from the several States.

It was most seriously urged by the Attorney General of California that questions of policy, laches, estoppel, and acquiescence should prevail to maintain the "status quo".

The Supreme Court disregarded such claims in the following words on Page 100, Law Ed.:

> "And even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. The Government, which holds its interest here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.
>
> . . . . . .
>
> But beyond all this we cannot and do not assume that Congress, which has constitutional control over Government property, will execute its powers in such way as to bring about injustice to states, their subdivisions, or persons acting pursuant to their permission. See *United States v.*

Texas, 162 U.S. 1, 89, 90, 40 L.ed. 827, 902, 903, 16 S. Ct. 725; *Lee Wilson & Co. v. United States*, 245 U.S. 24, 32, 62 L.ed. 128, 134, 38 S. Ct. 21."

A solemn acquiescence in that decision of the Supreme Court is respectfully urged and the opposite doctrine inherent in this case disapproved. The Judicial Process is not a process designed to set policy. While courts do "legislate interstitially", as Holmes remarked, or "fill in the gaps", as Cardoza puts it, they do not lawfully legislate in the grand manner, and do not legally ignore the positive provisions of Statutory Law. Such actions, if performed, are not judicial actions, nor does the court in performing them exercise a judicial power. They constitute examples of usurpation only, and are performed in defiance of well known institutions of the law.

COMMISSION'S LACK OF JURISDICTION TO GIVE AWAY U. S. GOVERNMENT'S OWNED MINERAL RIGHTS.

It will be noted from the pertinent sections of the Act of March 3, 1851 quoted in the appendix that Congress did not give the land commissioners any authority or jurisdiction to convey anything. At that time the title to all the minerals beneath the surface had vested in the United States, and that Commission was powerless to convey this vested property under any doctrine of settling private land claims. Those rights could only be conveyed by the Congress of the United States, or by authority it might give to the Secretary of the Interior. None were ever given. That property has remained and is still in the United States Government, and petitioner is entitled to a declaration to that effect.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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